

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division**

Anas ELHADY, et al.,

Plaintiffs,

v.

CHARLES H. KABLE, et al.,

Defendants.

Case No. 1:16-cv-375 (AJT/JFA)

JOINT STATUS REPORT

The parties, by and through undersigned counsel, respectfully respond to the Court’s Order of December 7, 2021, requesting that the Parties “inform the court by writing as to the outstanding issues in this case.” ECF No. 375.

Defendants’ Position. Defendants are aware of no further outstanding issues. The Court should now enter judgment in the Government’s favor, as directed by the Fourth Circuit. *See Elhady v. Kable*, 993 F.3d 208, 229-30 (4th Cir. 2021) (“We thus reverse the district court’s denial of the government’s motion for summary judgment and remand this case with instructions to enter judgment in favor of the government.”).

Although Plaintiffs state below that they seek leave to file another amended complaint, Defendants have not seen a proposed amended complaint, and would likely oppose a motion to amend as untimely and prejudicial. The possibility of a forthcoming motion to amend or a new lawsuit, however, does not affect the mandate issued by the Court of Appeals, and the Court should enter judgment for the Government now. *See United States v. Susi*, 674 F.3d 278, 283 (4th Cir. 2012) (stating that the mandate rule “compels compliance on remand with the dictates of a superior court”) (quoting *United States v. Bell*, 5 F.3d 64, 66 (4th Cir. 1993)).

Plaintiffs' Position. Plaintiffs agree that this Court should follow the Fourth Circuit's instructions and "enter judgment in favor of the government" on the procedural due process claims resolved. *Elhady v. Kable*, 993 F.3d 208, 229-30 (4th Cir. 2021). The Fourth Circuit, however, did not close the door on watchlist challenges of all kinds. Instead, the decision identified the kinds of challenges that can coexist alongside the decision in *Elhady*. And those challenges permitted by *Elhady* include "[i]ndividual applications of the program" that violate "recognized legal prohibitions and thus remain subject to judicial review." *Id.* at 213. Indeed, the Fourth Circuit was deliberate in emphasizing that its opinion "should not be read to suggest that law enforcement actions in airports or at the border are immune from judicial review." *Id.* at 225. *Elhady* goes so far as to suggest "other avenues, including Fourth Amendment claims," that "litigants can proceed through." *Id.*

Plaintiffs seek leave to amend their complaint consistent with the Fourth Circuit's decision in *Elhady*. This Court, as well as the legal teams on all sides, spent years in discovery establishing the most extensive factual record regarding the watchlisting system ever adjudicated. Those same facts can be put to use in furtherance of as-applied claims—via the Fourth Amendment as well as other sources of law suggested or implied by the Fourth Circuit—that respond to *Elhady*'s rejection of Plaintiffs' "roundhouse swing at the TSDB program" and fit within the case-by-case framework that now sets the ground rules for the adjudication of watchlist challenges. *See also Elhady* at 225 ("When aiming at a small and sensitive target, a scalpel is superior to a scythe.").

Dated: December 21, 2021

Respectfully submitted,

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